No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The government concedes, as it must, that the question presented here—whether generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining—"has divided the courts of appeals" and is a "frequently recurring question regarding the scope of an important ACCA predicate." U.S. Br. 7. And the Government agrees with petitioner that "[t]he Court's review is warranted." *Ibid.* This Court has consistently granted certiorari where the United States, as respondent, agreed that review was warranted—including in a recent case involving ACCA. See *Mathis* v. *United States*, No. 15-6092, 136 S. Ct. 894 (2016); see also, *e.g.*, *Lucia* v. *Securities & Exchange Comm'n*, 17-130, 138 S. Ct. 736 (2018); *Kokesh* v. *Securities & Exchange Comm'n*, No. 16-529, 137 S. Ct. 810 (2017); *Bruce* v. *Samuels*, No. 14-844, 135 S. Ct. 2833 (2015); *Menominee Indian Tribe of Wisconsin* v. *United States*, No. 14-510, 135 S. Ct. 2927 (2015); *Mach Mining, LLC* v. *EEOC*, No. 13-1019, 134 S. Ct. 2872 (2014). It should do so here.

1. The time is ripe for this Court's review. Burglary is one of the "most frequently committed" ACCA predicate offenses, *Taylor*, 495 U.S. at 581 (discussing H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1, 3 (1984)). As the government noted in seeking rehearing en banc on this very issue, the question presented "significantly impacts the federal sentencing regime, particularly given the centrality of burglary as one of four enumerated predicates has been amplified following *Johnson* [v. *United States*]'s

invalidation of the residual clause." *Morris* Gov't Stay Mot. at 5 (citing *Johnson*, 135 S. Ct. 2551 (2015)).[1]

Further delay would serve no purpose. Courts accounting for *fully 75%* of all federal criminal prosecutions have weighed in,[2] and the depth of the split means that "the conflict is unlikely to be resolved without this Court's intervention." U.S. Br. 11. The issue arises so frequently that just during the pendency of this petition in this Court, the en banc Fifth Circuit decided the issue, see *United States* v. *Herrold*, 883 F.3d 517, 531-536 (5th Cir. 2018), and two other petitions were filed presenting the same issue (albeit each with vehicle complications not present here). U.S. Br. 7 n.1; *id.* at 12.

The government half-heartedly suggests that "[i]n the alternative" to granting review, this Court "may wish to hold the petition in this case pending its disposition of * * * *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017 [and distributed for Conference of April 13, 2018])." U.S. Br. 7. A merits decision in *Stitt*, the government suggests, "may illuminate the proper scope of 'burglary' under the ACCA." *Ibid.*; see also *id.* at 12. But *Stitt* involves a completely different aspect of the definition of burglary: i.e., locations covered under generic burglary, and "[w]hether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as 'burglary' under [ACCA]." Pet. I, *United States* v. *Stitt*,

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[1] All defined terms are given the same meaning as in the petition.

[2] See Admin. Office of U.S. Courts, *Statistical Tables for the Federal Judiciary 2017*, Table D-3, https://goo.gl/vsrQx5.

No. 17-765. *Stitt* presents no question regarding *mens rea* or when a defendant must have developed the intent to commit a crime, for ACCA generic burglary. Nor are such issues fairly included within the question framed in *Stitt*. See R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). The government's reply brief in *Stitt* essentially concedes this point, distinguishing the "sole[] * * * ground" for decision in *Stitt*—i.e., whether generic burglary "applies to nonpermanent and mobile dwellings"—from questions involving *Taylor*'s intent requirement for ACCA burglary. U.S. Reply Br. at 10-11, *United States* v. *Stitt*, No. 17-765.

The government does not explain how this Court's resolution of the mobile-structure question in *Stitt* would meaningfully inform the contemporaneous-intent question presented here. For good reason. The Sixth Circuit already concluded that whether generic burglary applies to non-permanent structures, see *United States* v. *Stitt*, 860 F.3d 854, 860-861 (6th Cir. 2017) (en banc), does not affect that court's analysis of the contemporaneous-intent question here, see *United States* v. *Priddy*, 808 F.3d 676, 684-685 (6th Cir. 2015). The Sixth Circuit explained that "[n]othing in *Stitt* * * * undermined *Priddy*'s holding on [the intent requirement for generic] burglary," and as a result, "*Priddy*'s burglary analysis remains controlling." *United States* v. *Ferguson*, 868 F.3d 514, 516 (6th Cir. 2017). The Fifth Circuit also views the two questions as independent, recently reaffirming ACCA's contemporaneous-intent requirement, while expressly declining to reach the *Stitt* question. See *Herrold*, 883 F.3d at 536-541.

2. As the government correctly concluded, U.S. Br. 12, the two other petitions presenting this question are "less suitable vehicle[s]" than this case. In *Ferguson* v. *United States*, No. 17-7496, the district court stated that the "documents for each of [Ferguson's] three burglary convictions indicated his guilty pleas were to [a statutory provision]" which explicitly requires that the defendant entered the location "with intent to commit" a crime. Pet. at 8-9, *Ferguson*, *supra*. Ferguson challenged that determination on appeal, but the Sixth Circuit did not reach the issue, because it concluded that any of the statute's subsections constituted "generic burglary" under *Priddy*. In addition, "the district court originally concluded that Mr. Ferguson's five aggravated burglary convictions all qualified as violent felonies," before the Sixth Circuit reversed that conclusion based on *Stitt*. Pet. at 7, *Ferguson*, *supra*. If this Court were to reverse in *Stitt*, Ferguson may remain eligible for the ACCA enhancement on that basis. *Secord* v. *United States*, No. 17-7224, arises from an unpublished denial of a certificate of appealability to review the district court's denial of a 28 U.S.C. § 2255 petition. Because a certificate of appealability may issue only upon "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), that posture and other potential vehicle problems add a layer of complexity to the analysis. *E.g.*, Pet. at 4, *Secord*, *supra*.

3. The government only briefly (and unpersuasively) defends the judgment below. It does not even acknowledge—never mind engage—*Taylor*'s analytical approach for defining generic burglary. A contemporaneous-intent requirement "has the support

of the sources that the *Taylor* Court relied on in crafting its generic burglary definition," including contemporaneous treatises and state laws. *Herrold*, 883 F.3d at 532-533 & nn.92-96 (discussing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 8.13(b), 468 (1986)). While *Taylor*'s definition would have been recognized as burglary by most states at the time, 495 U.S. at 598, "not all states used 'remaining in' language in their burglary statutes," and those that did were "split in how they understood its scope." *Herrold*, 883 F.3d at 533-534 & nn. 100-102; see also *id.* at 534 & n.107 (noting "lack of consensus [in state practice] that existed at the time *Taylor* was decided"). Textually, the government's reading "puts entry almost entirely out of focus; because all entry is followed by [the government's] version of remaining in, * * * almost every instance of entry would automatically involve remaining in." *Id.* at 532. Finally, "[s]cenarios in which a defendant trespasses but does not intend to commit a crime"—such as a "'teenager[] who unlawfully enter[s] a house only to party, and only later decide[s] to commit a crime'"—"must engender less risk of confrontation than ones in which he enters *just to commit a crime*," *Herrold*, 883 F.3d at 534 (emphasis in original; quoting *United States* v. *Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007)).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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